

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
InterCall, Inc. Appeal of Decision)	
of the Universal Service Administrative Company)	
and Request for Waiver)	
)	CC Docket No. 96-45
InterCall, Inc.'s Petition for Stay of the)	
Decision of the Universal Service)	
Administrative Company)	
Universal Service)	
)	

OPPOSITION OF VERIZON TO RECONSIDERATION

Michael E. Glover, *Of Counsel*

Karen Zacharia
Christopher M. Miller
VERIZON
1515 North Courthouse Road
Suite 500
Arlington, VA 22201-2909
(703) 351-3071

Attorneys for Verizon

September 8, 2008

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY.....1

II. THE PETITIONS MUST BE DENIED BECAUSE PETITIONERS RAISE NO NEW MATERIAL QUESTIONS OF LAW OR FACT AND THE A+ PETITION WAS FILED BY PARTIES THAT DID NOT PARTICIPATE IN THE UNDERLYING PROCEEDING.2

III. PETITIONERS’ SUBSTANTIVE ARGUMENTS ALL LACK MERIT.4

A. Petitioners Misstate The Commission’s Holding In The *Pulver Order* And Mischaracterize Its Scope.....4

B. Information Features Attendant To InterCall’s Audio Conferencing Service Do Not Transform It Into An Information Service.6

C. For USF Purposes, There Is No Such Thing As A Stand Alone Audio Conferencing Provider.7

IV. THE COMMISSION PROPERLY ADJUDICATED INTERCALL’S APPEAL AND APPROPRIATELY WARNED OTHER PROVIDERS THAT THEY MUST ALSO PAY THEIR SHARE OF THE FUND.....9

V. CONCLUSION.13

OPPOSITION OF VERIZON¹ TO RECONSIDERATION

I. INTRODUCTION AND SUMMARY.

The Commission reasonably concluded in its recent *InterCall Order*² that audio conferencing services are telecommunications and that all audio conferencing providers should contribute to the Universal Service Fund (“USF” or “the fund”) on their end-user audio conferencing revenues. To avoid contributions, a few audio conferencing providers who persist in identifying themselves as “stand alone” providers now seek reconsideration of the order.³ There are no grounds for reconsideration; the Commission should deny the Petitions.

The Petitions should be dismissed because Petitioners raise no new questions of law or fact to warrant reconsideration. The A+ Petition should also be dismissed because it was filed by parties that did not participate in the underlying proceeding. In addition, Petitioners’ substantive arguments lack merit. The *Pulver Order* does not stand for the proposition that audio conferencing is an information service, but rather that a free, entirely web-based internet application that did not touch the PSTN and provided end-users with no transmission was an information service.⁴ Moreover, in the *Prepaid Calling Card Order*, the Commission rejected Petitioners’ argument that value-added information features attendant to InterCall’s

¹ The Verizon companies participating in this filing (“Verizon”) are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

² *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator, Order*, 23 FCC Rcd 10731 (2008) (“*InterCall Order*”).

³ A+ Conferencing, Ltd., Free Conferencing Corporation, and The Conference Group, *Petition for Reconsideration*, CC Docket No. 96-45 (July 30, 2008) (“A+ Petition” or “Petitioner A+ Conferencing”); Global Conference Partners, *Petition for Partial Reconsideration and Clarification of the InterCall Order*, CC Docket No. 96-45 (July 30, 2008) (“Global Conference Petition” or “Petitioner Global Conference”) (collectively the “Petitions” and “Petitioners”).

⁴ *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, ¶¶ 1-2 (2004) (“*Pulver Order*” or “*Pulver*”).

teleconferencing service transform the service into an information service.⁵ In addition, the classification of a service must be judged from the perspective of the end-user. The Commission, therefore, should reject Petitioners' suggestion that they be allowed to avoid direct contributions to the fund because they do not self-provision transport to their audio bridges. Finally, the Commission properly adjudicated InterCall's appeal and issued a decision that controls as precedent with similarly situated providers. Petitioner A+ Conferencing's claim that the Commission improperly conducted an industry-wide rulemaking and announced a new rule is wrong. Petitioners should appreciate that the Commission, as it could have, did not require stand alone providers to contribute to the fund for prior periods. If anything, the Commission should reconsider that decision.

II. THE PETITIONS MUST BE DENIED BECAUSE PETITIONERS RAISE NO NEW MATERIAL QUESTIONS OF LAW OR FACT, AND THE A+ PETITION WAS FILED BY PARTIES THAT DID NOT PARTICIPATE IN THE UNDERLYING PROCEEDING.

The Commission should dismiss the Petitions because the filings fail to meet the high standard for reconsideration. The Commission only grants reconsideration "if the petitioner cites material error of fact or law or presents new or previously unknown facts and circumstances which raise substantial or material questions of fact that were not considered and that otherwise warrant Commission review of its prior action." *Petitions for Reconsideration of the Second Report and Order; Implementation of Section 207 of the Telecommunications Act of 1996, et al.*, Order on Reconsideration, 14 FCC Rcd 19924, ¶ 7 (1999).⁶

⁵ *Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, ¶¶ 15-16 (2006) ("*Prepaid Calling Card Order*").

⁶ *See also Policies Regarding Detrimental Effects of Proposed New Broadcasting Stations on Existing Stations*, Memorandum Opinion and Order, 4 FCC Rcd 2276, ¶ 7 (1989) (reconsideration "will not be granted merely for the purpose of again debating matters on which the agency has once deliberated and spoken").

The Global Conference Petition merely reasserts and cites the same facts and authority it and others relied upon in previous filings in the underlying proceeding, and it should be dismissed for that reason. The A+ Petition also rehashes arguments previously asserted in this proceeding. Refusing to squander limited resources, the Commission routinely rejects reconsideration petitions such as these.⁷ The courts have upheld this approach where the Commission declines “to go back over ploughed ground.” *Southwestern Bell Telephone Company v. FCC*, 180 F.3d 307, 311 (D.C. Cir. 1999), *overruled on other grounds by Entravision Holdings, LLC v. FCC*, 202 F.3d 311 (D.C. Cir. 2000).

The Commission also should dismiss the A+ Petition without consideration because it was filed by parties that failed to participate in the original proceeding. The A+ Petition parties do not demonstrate “good reason why it was not possible for [them] to participate in the earlier stages of the proceeding.” 47 C.F.R. § 1.106(b)(1). Rather, Petitioner A+ Conferencing merely claims that the Commission failed to provide adequate notice of the issues to be addressed in this proceeding. This contention falls flat. Eight other parties managed to participate in the proceeding based on the public notice given by the Commission, which adhered to standard Commission procedure.

⁷ See, e.g., *General Motors Corp. and Hughes Electronics Corp., Transferors and The News Corporation Ltd., Transferee, for Authority to Transfer Control*, Orders on Reconsideration, 23 FCC Rcd 3131, ¶ 11 (2008) (noting that “the Commission has rejected petitions for reconsideration where the petitioner ‘essentially repeats the same arguments it relied upon in the comments and reply comments it filed’ and ‘fails to raise new arguments or facts that would warrant reconsideration of [the underlying] order.’”).

III. PETITIONERS' SUBSTANTIVE ARGUMENTS ALL LACK MERIT.

A. Petitioners Misstate The Commission's Holding In The *Pulver Order* And Mischaracterize Its Scope.

Petitioners place undue emphasis on the *Pulver Order*, which classified pulver.com's Free World Dialup ("FWD") offering as an unregulated information service. *Pulver Order* ¶ 1. Petitioner Global Conference argues that the holding in the *InterCall Order* conflicts with *Pulver*, stating that "the Commission found that the Free World Dialup. . .offering of 'conference bridging capabilities to members' is an 'information service' under the Act." Global Conference Petition at 2. This severely mischaracterizes the decision in *Pulver*, which found that pulver.com's free, web-based internet application was an information service. In *Pulver*, the Commission only mentioned conferencing once in the entirety of the decision as one of several "computing capabilities" offered by pulver.com using its Internet application, which did not connect to the PSTN and provided no transmission capability to the end-user. *Pulver Order* ¶¶ 6-11.

Petitioners' argument that FWD should be compared to the InterCall offering ignores the multifaceted inquiry the Commission conducts when making classification decisions. For example, Petitioner A+ Conferencing compares FWD's voice mail and other capabilities to InterCall's recording and storage features and suggests that because of that similarity alone, the Commission was required to find InterCall's audio conferencing service to be an information service. A+ Petition at 14. Petitioners cannot, however, square this approach with the central holdings in *Pulver* that: (1) FWD was a *web-based* application that facilitated connections between community members but primarily offered services based on computing capabilities; (2) pulver.com provided no interconnection to the PSTN whatsoever; (3) pulver.com provided no transmission capabilities (either itself or on a resale basis) to its end-users; and (4) FWD was

offered to community members free of charge. InterCall, by contrast, is a teleconferencing company that provides for transmission to and from a conferencing bridge and also offers value-added features for a fee. Such a service is in no way comparable to the service at issue in *Pulver*.

Petitioner Global Conference also focuses on the Commission's statement in the *InterCall Order* that InterCall's conference bridge facilitates call routing,⁸ arguing that this is a fatal error under *Pulver*. Global Conference Petition at 11. This argument ignores the fact that in *Pulver* the Commission had already determined that FWD predominantly involved nothing other than computer processing capabilities when it rejected the suggestion that ancillary voice capabilities should *remove* the service from the information service category. *Pulver Order* ¶ 12. InterCall did not contend, nor could it, that InterCall sells a computer processing service with a secondary voice feature. InterCall is in the audio conferencing business; voice connections are the essence of its service.

Moreover, since *Pulver* the Commission has squarely held that interconnected VoIP providers must contribute to the fund regardless of whether interconnected VoIP is telecommunications or an information service.⁹ Thus, the *Pulver Order's* relevance to InterCall's USF contributions must be viewed in light of the Commission's later decision requiring interconnected VoIP providers to contribute to the USF. To the extent Petitioners use VoIP for some aspect of their services, it follows from the *VoIP Contribution Order* that this does not itself absolve them from contributions, and arguing that their services are information services misses the point.

⁸ Based on an inaccurate reading of the *InterCall Order*, Petitioners argue that the Commission incorrectly likens a bridge to a switch or a router. A+ Petition at 9; Global Conference Petition at 11. However, the Commission stated only that the bridge *facilitates routing* of a phone call, not that it routes the call. *InterCall Order* at ¶ 11.

⁹ *Universal Service Contribution Methodology, Report and Order and Notice of Proposed Rulemaking*, 21 FCC Rcd 7518, ¶ 2 (2006) ("*VoIP Contribution Order*").

B. Information Features Attendant To InterCall’s Audio Conferencing Service Do Not Transform It Into An Information Service.

The Commission has treated teleconferencing services as telecommunications services since at least the 1980s.¹⁰ And as the Commission observed in the *InterCall Order*, toll teleconferencing has been included in the FCC Form 499-A and 499-Q Worksheet Instructions as an example of telecommunications subject to direct USF contributions since 2002. *InterCall Order* ¶ 4.

Contrary to Petitioners’ claims, the mere addition of value-added features does not transform an underlying service from toll teleconferencing into something more. A+ Petition at 11-13; Global Conference Petition at 12. The Commission’s *Prepaid Calling Card Order* makes clear that such features are not dispositive. In the *Prepaid Calling Card Order*, the Commission determined that the value-added features with menu-driven calling cards, such as optional sports scores and horoscopes, were not sufficient to classify these calling card services as information services. *Prepaid Calling Card Order* ¶¶ 1, 11. The classification question hinges on whether transmission capability is “sufficiently integrated” with any additional capabilities to make it a single product. *Id.* ¶ 14. But “[b]oth the Commission and the Court made clear that merely packaging two services together does not create a single integrated service.” *Id.*

InterCall’s offering is not integrated sufficiently to be considered an information service. Petitioners argue that an audio conferencing service can be integrated, pointing out that callers cannot bypass some functions of the audio bridge such as verification of the passcode and

¹⁰ See, e.g., *Application of American Telephone and Telegraph Co. and Certain Bell System Associated Companies for Authorization Pursuant to Section 214 to Supplement Existing Lines*, Memorandum Opinion, Order, Certificate and Authorizations, 89 FCC 2d 1017, 1026 (1982); *Communications Assistance for Law Enforcement Act*, Second Report and Order, 15 FCC Rcd 7105, ¶ 28 (1999); *Release of Funding Year 2008 Eligible Services List for Schools and Libraries Universal Service Mechanism*, Public Notice, 22 FCC Rcd 18751, Attachment at 2, 31 (2007).

collection of user input. A+ Petition at 12; Global Conference Petition at 18. These verification features are not materially distinct from the mandatory validation and other features of prepaid calling cards. *Prepaid Calling Card Order* ¶ 14. As with menu-driven calling cards, use of most additional features offered by InterCall is optional to the end-user. InterCall customers can conduct their conference calls completely independent of whether they choose to access these value-added features such as muting, recording, erasing, and operator services during the call. *InterCall Order* ¶ 13. At its core, InterCall’s service involves the transmission of voice traffic in the context of an audio conference.

C. For USF Purposes, There Is No Such Thing As A Stand Alone Audio Conferencing Provider.

All audio conferencing providers – including so-called “stand alone” providers – must contribute to the fund on the same basis under established Commission precedent. Parity in teleconferencing contributions is also required to avoid giving one group of competitors an unfair advantage in the highly competitive audio conferencing market. The Commission correctly determined that for purposes of USF contributions any distinctions between stand alone teleconferencing providers and integrated providers are immaterial and irrelevant. *InterCall Order* ¶¶ 11, 15-17.

Petitioners claim that the Commission’s *Computer Inquiry* line of decisions supports different USF contribution obligations for integrated versus stand alone teleconferencing providers (or facilities-based versus non-facilities-based providers). Global Conference Petition at 2-3. They are wrong. The regulatory classification of a service offering is judged from the end-user’s perspective, without regard to who actually provides the transmission or the other underlying components of the service. *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20

FCC Rcd 14853, ¶ 16 (2005) (declining to classify wireline broadband Internet access services differently depending on who owns the transmission facilities because “[f]rom the end user’s perspective, an information service is being offered regardless of whether a wireline broadband Internet access service provider self-provides the transmission component or provides the service over transmission facilities that it does not own.”), *aff’d Time Warner Telecom v. FCC*, 507 F.3d 205 (3d Cir. 2007); *Nat’l Cable Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 990 (2005). Stand alone teleconferencing providers may not self-provision transmission to or from their audio bridges, but from the perspective of an end-user, these providers offer the same service – the ability to host or participate in a conference call – as integrated providers. Indeed, point-to-point transmission and use of a bridge are the core of any audio conferencing product.

This perspective similarly explains the distinction the Commission made between InterCall and the “chat line” service at issue in *AT&T v. Jefferson Telephone Company*, 16 FCC Rcd 16130 (2001). *InterCall Order* ¶ 19. From the perspective of a Jefferson Telephone customer, the service provided was the random pairing of individuals for conversation. *Id.* The act of selecting and connecting two individuals to “chat” was the service. In contrast, a customer of InterCall seeks to have his or her audio transmission heard by a particular individual or group of individuals. “Randomness,” as Petitioner Global Conference Partners claims, is not now and never has been the critical distinction between telecommunications and information services. Global Conference Petition at 11-12. What matters is the service offering itself, as experienced by the end-user. And InterCall offers its customers the ability to conduct conference calls.

The end-user perspective also illuminates why stand alone conferencing providers cannot claim to offer only a bridging service and then liken that service to cable modems. A+ Petition

at 14. Foremost, stand alone providers *do not* market themselves as offering only casual use of a bridge. They claim to be in the same audio conferencing business as integrated providers and compete for the same customers. Customers thus view InterCall as providing an end-to-end conferencing solution. In contrast, the Supreme Court looked to the end-user's perspective in *Brand X* and determined that cable modems are first viewed by consumers as a vehicle to access the Internet. *Brand X*, 545 U.S. at 990. There, any use of a telecommunications element was so transformed by the added information service of a cable modem that the whole service was classified as an information service offering. *Id.* As discussed above, none of the information features identified by Petitioners here rise to the level of a transformative element as explained in *Brand X*. *See, e.g.*, Global Conference Petition at 14-16.

The essence of an audio conferencing service is the facilitation of routing calls for specified individuals to connect with each other. This is true for audio conferencing services offered by both stand alone and integrated providers, who go head-to-head every day for the same business. Thus, a level playing field with respect to USF contributions is required to reduce “the potential for continued ‘gaming’ of the system” that could “stifle continued market innovation and encourage providers to adapt their products solely to evade contribution to universal service funding mechanisms.” *Prepaid Calling Card Order* ¶ 8.

IV. THE COMMISSION PROPERLY ADJUDICATED INTERCALL'S APPEAL AND APPROPRIATELY WARNED OTHER PROVIDERS THAT THEY MUST ALSO PAY THEIR SHARE OF THE FUND.

Petitioner A+ Conferencing alleges that the Commission improperly conducted an industry-wide rulemaking and announced a new rule in the *InterCall Order*. A+ Petition at 3-7. The Commission did no such thing. In the *InterCall Order* the Commission evaluated InterCall's audio conferencing service against pre-existing rules and statutory mandates and

reasonably found that InterCall must contribute to the fund. The Commission appropriately used its discretion to choose between a rulemaking and an adjudication where a pre-existing statutory or regulatory mandate exists.¹¹ This is precisely the process that Petitioners and other similarly situated providers should have anticipated from the Commission's *Public Notice* announcing InterCall's appeal of the Universal Service Administrative Company's ("USAC's") contribution decision and establishing a comment cycle for interested parties to raise concerns.¹²

The *InterCall Order* was issued in the context of the adjudication of InterCall's appeal from USAC's application of the Commission's USF contribution rules,¹³ which were adopted pursuant to notice and comment rulemaking. The order established a controlling precedent for contributions to the fund by InterCall and similarly situated providers. Such is the case with every adjudicatory decision that interprets existing rules.

Still, Petitioner A+ Conferencing contends that it lacked notice that the Commission's decision on InterCall's appeal could have implications for similarly situated providers. A+ Petition at 5, n. 22. In support of its position, Petitioner A+ Conferencing cites only one case – *Forester v. Consumer Product Safety Commission*, 559 F.2d 774 (D.C. Cir. 1977) – which is inapposite. In the context of a notice and comment rulemaking, the agency in *Forester* issued a final rule concerning bicycle safety. *Id.* at 787-88. Appellants argued that the agency did not provide sufficient notice that the rule would apply to all bicycles, instead of just children's bicycles. *Id.* After evaluating the content of the public notices announcing the proposed rule,

¹¹ See, e.g., *SEC v. Chenery*, 332 U.S. 194, 201-02 (1947); *accord with NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-93 (1974).

¹² *Comment Sought on InterCall Inc.'s Request for Review of a Decision by the Universal Service Administrative Company and Petition for Stay*, Public Notice, 23 FCC Rcd 1895 (2008) ("*Public Notice*").

¹³ See, e.g., 47 C.F.R. §§ 54.702(b), 54.706; see also *Federal-State Joint Board on Universal Service*, Report and Order, 8776 FCC Rcd 8776, ¶ 795 (1997); 47 U.S.C. § 254(d).

the Court found that the notices were adequate to infer application of the regulation to all bicycles. *Id.*

Neither the holding nor the context of this case helps Petitioners' argument here. Indeed, it is difficult to imagine how the present situation could be more different. In its *Public Notice*, the Commission announced InterCall's appeal of USAC's decision that InterCall must make direct contributions to the fund on its audio conferencing service. *Public Notice* at 1. The *Public Notice* specifically urged interested parties to file comments in the proceeding regarding the decision in which "USAC ruled that InterCall's audio bridging services are toll teleconferencing services, requiring InterCall to submit FCC Form 499 filings to USAC." *Id.* The *Public Notice* was published in accordance with Commission policy in the Daily Digest, just as other Commission notices regularly are disseminated. Recognizing that agency adjudicatory precedent is binding on similarly situated entities, just as caselaw is binding, eight interested parties participated in the proceeding. The Commission then issued an adjudicatory decision applying existing law to the facts presented by InterCall and interested commenters – a decision that now has precedential implications for similarly situated providers. This is exactly what happens in virtually every adjudicatory decision that applies an existing Commission rule.

Petitioner A+ Conferencing's claim that notice was not sufficient to "discern that the Commission was poised to impose USF reporting and contribution requirements on an entire industry" is misguided. A+ Petition Conferencing at 6. It is axiomatic that similarly situated parties are treated similarly under the law. "The nature of adjudication is that similarly situated

non-parties may be affected by the policy or precedent applied, or even merely announced in dicta, to those before the tribunal.” *Goodman v. FCC*, 182 F.3d 987 (D.C. Cir. 1999).¹⁴

The only conceivable difference between the *InterCall Order* and most adjudicatory decisions issued by the Commission is that the Commission gave teleconferencing providers similarly situated to InterCall express warning that contributions to the fund were expected, established a grace period to come into compliance, and excused prior period contributions. *InterCall Order* ¶¶ 1, 25-26. The Commission then also directed USAC to conduct outreach to stand alone conferencing providers to ensure such providers were aware of the rules and were making efforts to comply with contribution requirements. *Id.* But the Commission was certainly not obligated to take any of these steps and instead could simply have directed USAC or the Enforcement Bureau to initiate additional proceedings against any stand alone audio conferencing provider not properly contributing to the fund. If the Commission reconsiders anything, it should reconsider its decision to essentially give non-contributing stand alone providers a free pass for not paying their share of the fund in the past and even more time to start paying.

¹⁴ See also *Kidd Commc'ns. v. FCC*, 427 F.3d 1, 5 (D.C. 2005) (“When an agency does so by adjudication, because it is a policymaking institution unlike a court, its dicta can represent an articulation of its policy, to which it must adhere or adequately explain deviations.”).

V. CONCLUSION.

For these reasons, the Commission should deny the Petitions.

Respectfully submitted,

By: _____

Michael E. Glover, *Of Counsel*

Karen Zacharia
Christopher M. Miller
VERIZON
1515 North Courthouse Road
Suite 500
Arlington, VA 22201-2909
(703) 351-3071

Attorneys for Verizon

September 8, 2008